

Case No. _____

In the Court of Appeal of the State of California
Fourth Appellate District, Division Three

DON BARNES, in his official capacity as Sheriff of Orange County,
Petitioner and Defendant,

vs.

SUPERIOR COURT FOR THE COUNTY OF ORANGE

CYNTHIA CAMPBELL, MONIQUE CASTILLO, SANDY
GONZALES, CECIBLE CARIDAD ORTIZ, MARK TRACE and
DON WAGNER

Real Parties in Interest— Plaintiffs

Petition for Writ of Mandate to
Orange County Superior Court
Case No. 30-2020-01141117-CU-WM-CXC
Honorable Peter J. Wilson

**AMICUS BRIEF OF CITIES OF NEWPORT BEACH,
CYPRESS, DANA POINT, GARDEN GROVE, HUNTINGTON
BEACH, LA HABRA, LAGUNA BEACH, LAGUNA HILLS,
LAGUNA NIGUEL, LAKE FOREST, MISSION VIEJO,
ORANGE, PLACENTIA, RANCHO SANTA MARGARITA, SAN
CLEMENTE, SAN JUAN CAPISTRANO, STANTON, TUSTIN,
VILLA PARK, WESTMINSTER, YORBA LINDA;
DECLARATION OF LIEUTENANT RASMUSSEN IN
SUPPORT OF BRIEF**

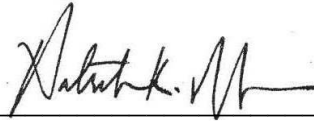
In Support of Petitioner and Defendant,
Don Barnes, Sheriff of Orange County

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court 8.488, the undersigned, Counsel for *Amici Curiae*, certifies that he knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on December 23, 2020 at Newport Beach, California.

A handwritten signature in black ink, appearing to read "Patrick K. Bobko", is written over a horizontal line.

Patrick K. Bobko

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MEMORANDUM

“We turn to a second error: *the failure to defer to correctional administrators in a matter implicating safety and security concerns*. “When evaluating reasonableness, ... courts must afford prison administrators ‘wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.’ ” *Henry v. Hulett*, 2020 WL 469188 (7th Cir. 2020) (*en banc*) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979))”

- *Mays v. Dart*, 974 F.3d 810, 820 (7th Cir. 2020) (emphasis added)

The duly-elected Orange County Sheriff Don Barnes has wide discretion on how best to protect the residents of Orange County and how to administer the jails of a County more populous than 21 states. Under a traditional writ of mandate standard, this discretion must remain vested in his capacity as Sheriff absent the presence and violation of a ministerial duty.

Centuries of public policy justify this approach and the broader approach to the separation of powers.

Regarding the early release of inmates, Orange County residents and the public officials who represent those residents

expect the Sheriff and his deputies to perform individualized risk analyses that contemplate the effect of any action on the victimizer, the victim, and potential victims.

Here, the Respondent Court has substituted its own discretion for that of the elected Orange County Sheriff. In doing so, the Respondent Court violated the standards for a writ of mandate. More fundamentally though, the Respondent Court has failed to contemplate the impact of more than 1,000 suddenly released inmates, some of whom were incarcerated for crimes such as murder, attempted murder, and child molestation, on Orange County's cities.

The hurried release of these inmates thrust upon the Sheriff will have profound impacts on all Orange County cities. The Respondent Court cannot possibly know or anticipate the unintended consequences and secondary impacts its Order will have on law enforcement, the surrounding communities, or the inmates themselves. Moreover, the Respondent Court's apparent willingness to order the wholesale release of so many dangerous inmates on such an expedited timetable without any specific assessment of each is dangerous, discordant, and jarring.

And there is no evidence that the Order will have the desired effect; the Respondent Court's assumption that simply releasing inmates will prevent them from contracting the virus has no empirical basis. Hundreds of Orange County residents test positive daily. They are not in jail – so shouldn't they be safe from the virus?

Relatedly, the Respondent Court's Order does not take into account the current status of the two approved vaccines and that inmates are likely to be able to receive vaccines soon. In fact, the ACLU has taken the position in other jurisdictions that vaccines are an effective means to protect inmates.¹ Providing vaccines is a more circumspect solution to this potential issue versus a massive release of dangerous inmates into the public.

The issues here are immediate, profound, and far-reaching, and for these reasons the Court of Appeal should take this matter on an expedited basis and reverse the Respondent Court's order. COVID-19 requires prompt action in these unprecedented times, but it does not justify the Respondent Court's effective take-over of the Orange County Jail and mandatory release of half the people incarcerated there.

*Amici*² request the Court of Appeal issue an order to show cause as to why an immediate stay of the Respondent Court's Order should not be granted and writ should not issue.

¹ "Connecticut Vaccine Rollout Must Include Incarcerated People," ACLU (Dec. 2, 2020) available at: <https://www.aclu.org/press-releases/connecticut-vaccine-rollout-must-include-incarcerated-people>.

² The City of Newport Beach is joined by the following twenty other Orange County cities: Cypress, Dana Point, Garden Grove, Huntington Beach, La Habra, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, Orange, Placentia, Rancho Santa Margarita, San Clemente, San Juan Capistrano, Stanton,

I.

Factual Background

Orange County has submitted with its petition a comprehensive Appendix providing the background facts pertinent to the Orange County Jail and Sheriff Barnes' efforts to reduce the inmate population in the face of a global pandemic. *Amici* adopt those facts and present additional facts pertinent to this brief.

A. The County of Orange and Amici Have Taken Proactive Steps to Limit COVID-19 Exposure to Inmates and Peace Officers

Since the COVID-19 pandemic arrived in California late last winter, officials at all levels of government have been working to develop a response that protects California residents. The same is true for cities throughout Orange County, which have endeavored to provide the same necessary civic services to its residents as before the pandemic, including the enjoyment of open spaces with social distancing, while also providing important guidance and resources to its residents and businesses, such as information regarding COVID-19 case counts, "Stay At Home" order guidance, small business support, updates from City Managers, and active

Westminster, Tustin, Yorba Linda, and Villa Park as ("*Amici*") on this brief.

collaboration among their 34 Mayors. Indeed, municipalities and government officials across the state have been working to support their residents in light of the extremely difficult circumstances COVID-19 presents.

Although some Orange County cities have contracted with the Sheriff's Department to provide law enforcement services, many have their own police departments which have implemented a series of measures designed to limit the potential transmission of COVID-19, including steps for handling individuals who are detained for DUI and other offenses.³ For instance, the Newport Beach Police Department has implemented specific protocols based upon guidance from the Centers for Disease Control ("CDC") and the California Department of Public Health.⁴ That said, similar to the community as a whole, several police officers have been infected by COVID-19, impacting staffing and service levels.

For its part, the Orange County Sheriff's Department began proactively taking steps to mitigate the risks presented by COVID-19 in its jails as early as March 2020. It began releasing some individuals 10 days early to stop the spread of COVID-19 while also

³ Declaration of Lieutenant Steve Rasmussen ("Rasmussen Decl.") at paragraphs 4-12. The Rasmussen Declaration is appended to the end of this brief.

⁴ Rasmussen Decl. at ¶ 3.

taking steps to reduce the prison population by creating accelerated release procedures for nonviolent offenders and the medically vulnerable. Sheriff Barnes said of these procedures that they were “made collaboratively and [were] absolutely necessary to stop the spread of this virus and preserve lifesaving medical resources . . . we are taking action to protect those in our custody, reduce the risk to our correctional personnel, and ultimately preserve our mission to keep the public safe.”⁵ After collaboration with the relevant stakeholders and the community, the Superior Court approved the plan, describing it as “extremely reasonable,” with prosecutors and public defenders in agreement.⁶

B. The ACLU Filed Two Overlapping Lawsuits and Ignores the Cities’ and County’s Prior Efforts

The ACLU appears to oppose Sheriff Barnes’ original plan that was met with resounding approval from Presiding Judge Nakamura and a variety of stakeholders in Orange County’s criminal justice system. That opposition does not appear to contemplate the acute dangers various individual inmates have

⁵ Saavedra and Emery, “Early release begins in Orange County jails after more than 100 inmates exposed to coronavirus” ORANGE COUNTY REGISTER (March 27, 2020). Petitioner’s Exhibits to Petition for Writ of Mandate/Prohibition, Vol.1– Exhibit E.

⁶ *Id.*

presented to the community and may well again if they were to be released on an emergency basis well before the time the law would otherwise allow.⁷

The ACLU separately filed a similar suit against the Orange County Sheriff in the U.S. District Court for the Central District of California on April 30, 2020. That suit, captioned *Ahlman v. Barnes*, has already been the subject of expedited discovery and hearings.⁸

Although the federal District Court issued an injunction largely in favor of the ACLU in May 2020⁹, that decision is currently on appeal to the Ninth Circuit.¹⁰ More importantly however, the United States Supreme Court issued a stay *in favor of* Sheriff Barnes pending the disposition of that appeal on the merits and any decision on a subsequent petition for *certiorari*.¹¹ Thus,

⁷ “ACLU Sues O.C. Sheriff Over Jail Conditions During Pandemic” ACLU Southern California (Apr. 30, 2020) available at: <https://www.aclusocal.org/en/press-releases/aclu-sues-oc-sheriff-over-jail-conditions-during-pandemic>.

⁸ Case No. 8:20-cv-835-JGB-SHK (C.D. Cal.)

⁹ *Ahlman v. Barnes*, 445 F.Supp.3d 671 (C.D. Cal. May 26, 2020).

¹⁰ *Ahlman v. Barnes*, No. 20-55568 (9th Cir.) (pending)

¹¹ *Barnes v. Ahlman*, --- U.S. ---, 140 S.Ct. 2620 (Mem.) 207 L.Ed.2d 1150.

the ACLU's first attempt to obtain the release of inmates *via* the federal courts became moribund pending lengthy appellate briefing in the Ninth Circuit.¹² This action is the second attempt to obtain the same relief in state court.

Despite this pressure in the intervening months, Sheriff Barnes continued to act in the interests of public safety and inmate protection by pursuing a strategy of early release and implementation of \$0 bail. The result was initially a 33% reduction in the prison population and eventually a 50% reduction based on an individualized assessment of inmate vulnerability and danger to the community.¹³

¹² The Ninth Circuit's docket for this case suggests that it is being considered for possible calendaring of oral argument in April 2021. Even assuming the oral argument takes place in April of next year, the panel's decision and any possible certiorari petition process would mean that a resolution would not be available until sometime in the fall of 2021, at the earliest.

¹³ Spitzer, "Press Release: Orange County District Attorney Tony Spitzer Releases Statement Criticizing Court Ruling to Reduce County Jail Population by 50%" Office of the District Attorney (Dec. 12, 2020) available at: <http://orangecountyda.org/civica/press/display.asp?layout=15&Entry=6087>.

C. The Respondent Court's Initial Order

It is against this background that the Court's December 11, 2020 Order mandated a reduction in the already-reduced jail population by an additional 50%. *Amici* do not concede the Respondent Court's authority to issue the Order. If such authority exists however, *Amici* express two major concerns with it.

First, while the Order mandates that the Sheriff create a plan for mass prisoner release with breathtaking speed over the Christmas and New Years holidays, it is silent on the myriad and immense impacts a sudden and mass prisoner release will have on the communities they enter. The Respondent Court's Order, in effect, turns justice on its ear by putting the victimizers' well-being over that of their victims.

Second, the Respondent Court's Order is silent on how prisoners are to be released with respect to the threat any individual poses to the community. Since the Sheriff has already released "low-level" offenders in his custody, the practical effect of the Court's order is to release, with unprecedented haste, half of Orange County's current inmates from the Sheriff's custody. COVID-19 is a public health threat to everyone, both within the jails and in the community. But the virus is not the only threat to public safety, as the population of prisoners to be released under the lower court's Order will be of wholly different cloth than those already released by the Sheriff over the past several months.

For its part, the City of Newport Beach, the *Amici*, and their residents have already been under substantial strain from the

COVID-19 pandemic. A revived “Stay At Home” Order has put pressure on the mental health of the City’s residents, and continued stress on small business owners’ livelihoods. It is straining law enforcement.¹⁴ As of the date of this filing, COVID hospitalizations and ICU patients are at record levels.¹⁵ Shelters for the homeless are already in unprecedented demand. The medically vulnerable, many of whom may be family that released inmates may need to live with, are isolating to protect themselves.

These extraordinary challenges have already taxed the capacity of communities to care for their residents. A sudden release of more than 1,000 prisoners could very well cause these resources to snap.

It is also worth noting a fact highlighted by the Sheriff, that the Order will affect hundreds of individuals who have been adjudicated to be among the most dangerous individuals in the County.¹⁶ The trial court called the people who would be released

¹⁴ *See generally*, Rasmussen Decl.

¹⁵ Goertzen, “Coronavirus: Orange County reported an all-time daily high of 3,445 new cases as of Dec. 19,” The Orange County Register (Dec. 19, 2020) available at: <https://www.ocregister.com/2020/12/19/coronavirus-orange-county-reported-an-all-time-daily-high-of-3445-new-cases-as-of-dec->.

¹⁶ CBSLA Staff, “‘The Public Should Be In A Panic’: Orange County Jail Population Ordered To Be Cut In Half,” CBS Los Angeles (Dec. 14, 2020) available at:

“medically vulnerable inmates, including those with disabilities,” which might lead some to conclude the affected prison populations consist of nonviolent drug offenders, and, due to long prison sentences, the elderly. There does not appear to be any evidence in the record to support this statement. Of those that fit the trial court’s category, 59 are incarcerated for murder, 39 for attempted murder, and 90 for child molestation and a litany of other crimes. Experience has borne this concern out: Orange County inmates released early before serving their full sentence or on \$0 bail have committed new crimes at rates nearly triple normal recidivism rates: 44% for early release inmates and 38% for \$0 bail defendants.¹⁷ And together, they constitute hundreds of violent criminals who under the Court’s order would be released onto the streets of Orange County, where they will no longer be under the supervision of jail staff, but rather in direct contact with the county’s businesses, law enforcement, and residents.

<https://losangeles.cbslocal.com/2020/12/14/jail-inmates-release-inmates-orange-county/>.

¹⁷ Rasmussen Decl. at ¶¶ 16-21; Press Release of the District Attorney, Tony Spitzer (Dec. 12, 2020) available at: <http://orangecountyda.org/civica/press/display.asp?layout=15&Entry=6087>.

II.

No Authority Exists That Creates a Ministerial Duty for Which a Traditional Writ of Mandate Can Issue

Plaintiffs and Petitioners' (collectively "Petitioners") are not entitled to a writ of mandate under Code of Civil Procedure section 1085 because there is no statute that compels Sheriff Barnes to take a particular action regarding inmates in the County Jails - even in the face of the global pandemic. Nor is there any authority that imparts upon the Sheriff a ministerial duty that the Court can enforce *via* mandate.

The trial court overstepped its authority and substituted its judgment for the County's elected top law enforcement officer. Issuing the writ of mandate was error.

A. A Traditional Writ of Mandate Will Lie Only Where a Statutory Obligation Exists to Perform a Ministerial Act

The Petitioners' second cause of action for a writ of mandate pursuant to Code of Civil Procedure section 1085 asserts Sheriff Barnes "has a statutory duty to 'keep the jail and the prisoners in

it'. Cal. Gov't Code § 26605.”¹⁸ This statement is true and the citation that follows is correct, but none of the allegations that follow outline a claim for which mandate applies.

A “traditional” writ of mandate under Code of Civil Procedure section 1085 lies, “to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station...” Under this section, a writ will only issue, “to compel performance of a clear, present, and usually ministerial duty in cases where a petitioner has a clear, present and beneficial right to performance of that duty.”¹⁹

Digging a little deeper into well-established California law reveals that a “ministerial duty” is one that is required by statute. It typically involves a clearly defined course of action that an official or entity must take when a specified set of circumstances arise. It requires no judgment or discretion by the public official. “The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision.”²⁰ For

¹⁸ Petitioner’s Exhibits to Petition for Writ of Mandate/Prohibition Vol. 1, Exh. C [Redacted Am. Petition at ¶113].

¹⁹ *Morris v. Harper*, 94 Cal.App.4th 52, 58 (2001) (“Mandamus has long been recognized as the appropriate means by which to challenge a government official’s refusal to implement a duly enacted legislative measure.”)

²⁰ *Mountain Lion Found. v. Fish & Game Com.*, 16 Cal.4th 105, 117, (1997); see also *People ex rel. Becerra v. Superior Court*, 29

example, revocation of a teaching credential when the teacher is convicted of a specified crime, or the revocation of a driver's license after conviction of a specified offense are both ministerial acts.²¹

Importantly, and directly applicable to this situation, mandate does not lie to control an official's exercise of his or her discretion. A court may compel an entity or government official to act when they refuse to act, but the court cannot use mandamus to compel them to act in a particular way.²² Moreover, a court cannot employ mandamus to compel a government official to exercise his or her discretion to reach a particular result. "When the duty of a public body is broadly defined, the manner in which it carries out that responsibility ordinarily requires the exercise of discretion;

Cal.App.5th 486, 503 (2018), *as modified* (Nov. 28, 2018), *review denied* (Feb. 27, 2019) ("A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment.' [Citation.]").

²¹ See *Di Genova v. State Bd. of Ed.*, 45 Cal.2d 255 (1955) (teacher's license); *Cook v. Bright*, 208 Cal.App.2d 98 (1962) (driver's license).

²² *Orange Unified Sch. Dist. v. Rancho Santiago Cmty. Coll. Dist.*, 54 Cal.App.4th 750, 765 (1997) ("Although a court may order a public body to exercise its discretion in the first instance when it has refused to act at all, the court will not compel the exercise of that discretion in a particular manner or to reach a particular result.")

under such circumstances, *mandate is not available to order that public body to proceed in a particular manner.*”²³

Yet this is exactly what the trial court did here.

The trial court incorrectly creates and then applies “two prongs” to Petitioner’s writ of mandate; that the Sheriff exercise his duties in a way that does “not derogate the constitutional rights of others,” and that his failure to “release or transfer medically vulnerable and disabled individuals out of the Jail is an abrogation of his duties under Government Code section 8658.”²⁴ Although perhaps meaningful within the context of a civil rights action (which this case is not), neither of these “prongs” provide the basis for the issuance of a writ of mandate. The two “prongs” have no bearing on whether there is a “ministerial duty” required by statute.

²³ *Bldg. Indus. Assn. v. Marin Mun. Water Dist.*, 235 Cal.App.3d 1641, 1646 (1991) (emphasis added); *see also California Pub. Records Research, Inc. v. County of Yolo*, 4 Cal.App.5th 150, 178 (2016) (finding a statute that required county board to charge and set copying fees did not control the amount of those fees or the considerations for setting them).

²⁴ Petitioner’s Exhibits to Petition for Writ of Mandate/Prohibition Vol. 1, Exh. C [Dec. 11, 2020, OC044].

B. No Legal Authority Exists Compelling Sheriff Barnes to Exercise His Discretion in a Particular Way

The fundamental flaw in the trial court's order is its failure to identify a particular statute that imposes a ministerial duty upon Sheriff Barnes. Absent a ministerial duty, the Respondent Court's Order must be reversed. There is no statutory authority that compels the Sheriff to reduce inmate counts "to ensure appropriate social distancing," much less to reduce the head-count at the County Jail to a particular numerical level. The court cannot substitute its discretion for the County's elected Sheriff and cannot make the Sheriff exercise his discretion in any particular way.

Although Respondent Court did address Government Code section 8658, the court qualified its analysis by stating:

"Regarding Government Code section 8658, it is not clear whether that section imposes merely discretion, or a specific mandate. While it states that the person in charge 'may remove the inmates from the institution' it goes on to provide, in relevant part, that '[h]e shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to

avoid the danger, or, if that is not possible, may release them.”²⁵

Found amidst a series of sections dealing with emergencies and emergency response actions, Government Code section 8658 says the person in charge of an institution – in this case Sheriff Barnes – “may” remove inmates to other locations or “may” release them. The language of section 8658 implicitly recognizes the balancing of competing interests and professional discretion involved in making decisions about what to do with inmates during an emergency. The statute couches the exercise of that discretion in phrases such as “if possible” and the most deferential and permissive legislative word of all - “may.”²⁶

And because section 8658 does not impose ministerial duties upon the Sheriff, the court extrapolates and appends to that section as a requirement that the Sheriff, “is not exercising his duties [under section 8658] in a manner that does not derogate the

²⁵ Petitioner’s Exhibits to Petition for Writ of Mandate/Prohibition Vol. 1, Exh. C [Dec. 11, 2020, OC046].

²⁶ See *Common Cause v. Bd. of Supervisors*, 49 Cal.3d 432, 443 (1989) (“It is a well-settled principle of statutory construction that the word ‘may’ is ordinarily construed as permissive, whereas ‘shall’ is ordinarily construed as mandatory, particularly when both terms are used in the same statute.”)

constitutional rights of others...”²⁷ The trial court goes on to concede the Sheriff is “without dispute the responsible authority over the inmates in his custody in the Orange County Jail,” but believes he is not properly exercising that discretion. The Order makes clear the Respondent Court’s erroneous belief the Sheriff should exercise that discretion in a different way and even provides him with a metric for employing his discretion in conformance with the trial court’s preference – he must reduce the inmate population by 50%.²⁸

Again, the trial court’s concerns about inmates’ constitutional rights are entirely appropriate for a civil rights action but are not grist for a traditional writ of mandate.²⁹ There is no statutory mandate compelling Sheriff Barnes to act in one way or another concerning his management of the County Jail and the court cannot substitute its discretion for the Sheriff’s.³⁰

²⁷ Petitioner’s Exhibits to Petition for Writ of Mandate/Prohibition Vol. 1, Exh. C [Dec. 11, 2020, OC045].

²⁸ Petitioner’s Exhibits to Petition for Writ of Mandate/Prohibition Vol. 1, Exh. C [Dec. 11, 2020, OC048].

²⁹ *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 315 (1943) (a court will not “substitute its discretion for the discretion properly vested in an administrative agency”).

³⁰ *Weinstein v. County of Los Angeles*, 237 Cal.App.4th 944, 965 (2015) (“In determining whether a public agency has abused its discretion, the court may not substitute its judgment for that of the

Petitioners fashioned their pleading to include a claim for traditional mandate with the express purpose of obtaining a writ compelling the Sheriff to release 1,000 or more inmates from the County Jail. But the allegations – serious as they may be - do not establish the legal predicate for the Court to issue a writ under section 1085, and the corresponding remedy the Petitioners seek is therefore unavailable to them. COVID-19 is not an excuse to either ignore constitutional rights or long-established limits on the court’s power *via* mandate. No writ should issue.

C. The “Clarified” Order Remains Infirm

The Respondent Court’s order, as “clarified” on December 15, 2020, orders up to a fifty percent (50%) reduction of county inmates and requires that each jail cell be converted into single occupancy. The sole evidentiary basis for a 50% reduction cited by the Respondent Court was an email dated March 27, 2020.³¹ That email, issued by the Orange County Health Care Agency to the Sheriff’s office (Commander Joe Baliki) is outdated by the passage of events and was effectively disavowed by the subsequent declaration of one of its two co-authors, Dr. Chun Chiang. There is

agency, and if reasonable minds may disagree as to the wisdom of the agency’s action, its determination must be upheld.”)

³¹ Petitioner’s Exhibits to Petition for Writ of Mandate/Prohibition Vol. 1, Ex. T at pp. OC 709-710.

no other evidentiary support for the “50% solution” proposed by the Respondent Court. The trial court inappropriately relied upon the factually distinct decision from the First District Court of Appeal in *In re: Ivan Von Staich*, 56 Cal.App.5th 53 (2020) (“*Von Staich*”).

In *Von Staich* the court had an expert memorandum prepared by the former Dean of the UC Berkeley School of Public Health (the “Urgent Memorandum”) recommending a fifty percent (50%) reduction of the inmate population based in part upon the hundred-plus year-old structure of San Quentin State Prison – with “exceedingly poor ventilation and extraordinary close living quarters...” That facility suffered a major COVID-19 outbreak – 2,200 confirmed cases and 28 deaths – far worse than anything experienced in Orange County Jail. The Respondent Court’s reliance upon a single e-mail from March 27, 2020 as the justification for its fifty percent (50%) reduction figure is simply not persuasive. Also, the trial court did not consider Sheriff Barnes’ reduction of the inmate population in response to concerns about COVID-19.

The co-author of the March 27, 2020 e-mail, Dr. Chiang, filed a declaration dated November 16, 2020 (ROA No. 219) in which he detailed the close and constant cooperation with the Sheriff’s office to limit and reduce COVID-19 infections in the County Jail and elsewhere. Nowhere in that declaration does Dr. Chiang repeat or even suggest a re-imposition of his March 27, 2020 e-mail recommendation.

There simply is no justification in the factual record for relying on *Von Staich*.

Amici suggest this Court should instead look to the Seventh Circuit Court of Appeals' recent decision in *Mays v. Dart* for guidance.³² In that case, the Seventh Circuit took issue with a District Court's order that mandated certain "social distancing" measures on the Cook County Jail because "group housing and double celling subject detainees to a heightened, and potentially unreasonable and therefore constitutionally unacceptable, risk of contracting and transmitting the coronavirus."³³

The Seventh Circuit held the District Court's order was in error on three points: "the district court failed to consider the Sheriff's conduct in its totality, failed to afford proper deference to the Sheriff's judgment in adopting policies necessary to ensure safety and security, and cited an incorrect legal standard" in evaluating the inmates' claims.³⁴ The Seventh Circuit also noted the District Court "did not discuss any other aspect of the Sheriff's

³² 974 F.3d 810 (7th Cir. 2020).

³³ *Mays*, 974 F.3d at 817.

³⁴ *Mays*, 974 F.3d at 813.

response to COVID-19; instead, the court limited its discussion solely to the importance of social distancing.”³⁵

The Seventh Circuit’s language concerning the “totality of the circumstances” is directly applicable to this case:

“[T]he district court hinged its decision to impose a social distancing directive on the basis of one, and only one key factual finding: ‘At the current stage of the pandemic, group housing and double celling subject detainees to a heightened . . . risk of contracting and transmitting coronavirus.’ We do not suggest that this finding was erroneous . . . Instead, we take issue with what was missing: absent from the district court’s reasoning was any mention of the totality of the measures the Sheriff already had taken to combat the spread of COVID-19, including those regarding social distancing.”³⁶

Regarding the issue of deference, the Seventh Circuit found the District Court’s “passing reference” to the Cook County Sheriff’s “interest in managing the Jail facilities and to practices

³⁵ *Mays*, 974 F.3d at 817.

³⁶ *Mays*, 974 F.3d at 820.

that are needed to preserve order and discipline and maintain security” was insufficient.³⁷ The Sheriff, as the individual in charge of the county jails, had “substantial discretion to devise reasonable solutions to the problems” he faced.³⁸ The Seventh Circuit found the District Court’s failure to take the Sheriff’s discretion into account – even in the face of COVID-19 – “was legal error.”³⁹

Amici respectfully submit that *Von Staich* is a case limited to its facts that should not be used as a template for other jails. *Mays*, on the other hand, is a more applicable and although a federal case, provides clearer analytical guidance to this Court.

III.

The Respondent Court’s Policy-Making Approach Is Laid Bare When a Simple Question Is Asked – “What Comes Next?”

Once inmates are released from the Sheriff’s custody, they will be subject to significantly less regulation (if any). The Sheriff

³⁷ *Mays*, 974 F.3d at 821.

³⁸ *Mays*, 974 F.3d at 820.

³⁹ *Mays*, 974 F.3d at 821.

cannot easily reach outside the jailhouse's walls to direct inmates where to go, provide them with food, housing, and health care, direct them to take precautions against the spread of COVID-19, or insulate them from the broader community in which COVID-19 is spreading rapidly. In terms of the outcomes that released inmates will face, it is far from clear that mass release is in their best interest.

The Sheriff's Department normally releases inmates pursuant to a deliberative administrative process that takes into account the inmate's needs, the threat posed to the community, access to transitional housing, friend or family networks for housing, and access to the social safety net. But the Order's extraordinarily quick timeline makes such bureaucratic deliberation practically impossible.

Consider the numerous practical hurdles that must be overcome that are made even more difficult by the pandemic. First – where do the released inmates go? Transitional housing can hardly be expected to pivot in one month's time and accommodate a sudden influx of new people, even in normal times. The obvious capacity problems are compounded by the fact that if these facilities are practicing their own social distancing protocols, they will be even less able to accommodate a massive release of inmates.

Do the newly released inmates go back to multi-generational family settings? What reason is there to think the local communities will be able to absorb this excess population, as inmates who might otherwise return to friends and family will not

have time for adequate notice and preparation of their arrival. That is to say nothing of the fact that many community members who might otherwise help provide shelter to the newly released might themselves be medically vulnerable and unable to put roofs over the inmates' heads.

Are newly released inmates who have neither family nor access to social services going to be homeless? Once on the streets, released prisoners will no longer be subject to or protected by the COVID-19 protocols imposed by the Sheriff or the structured environment at the Orange County Jail. Homelessness could very well be a far greater threat than they would ever face under custody. Even before the COVID-19 pandemic, California faced a homelessness crisis, increasing by 43% from 2017 to 2019.⁴⁰ Formerly incarcerated people are also ten times more likely to experience homelessness in California.⁴¹ Housing programs,

⁴⁰Ritchie, "Homelessness continues to be a county-wide issue, but how individual cities are addressing it differs," The Orange County Register (Jan. 5, 2020) available at: <https://www.ocregister.com/2020/01/05/homelessness-continues-to-be-a-county-wide-issue-but-how-individual-cities-are-addressing-it-differs/> ("The Point in Time Count, a federally mandated biennial census to determine the number of homeless people in the county, showed a 70% increase from 2018.").

⁴¹Levin and Botts, "California's homelessness crisis – and possible solutions – explained," Cal Matters (Dec. 31, 2019, updated Jan. 8,

including emergency shelters, already face insufficient capacity to meet the current demand for beds and housing for people who are experiencing homelessness.

These questions exemplify the very reasons why the Respondent Court cannot employ a traditional writ to supplant the Orange County Sheriff's authority and micromanage the County Jail by substituting its own views for the County's highest elected law enforcement official's.

The lower court's order creates a perfect storm of problems for everyone – the Sheriff, the communities to which the inmates will return, and for the inmates themselves. Far from ensuring the safety of those incarcerated in Orange County Jail, the situation for inmates outside of the county jail could well be a greater threat than they would ever face in custody.

While the possibility of outbreak is always possible within the confines of the Orange County Jail, there it is at least a manageable issue and resources to deal with it are available.

2020) available at: <https://calmatters.org/explainers/californias-homelessness-crisis-explained/>.

The likely consequence of such a release is disaster for the released inmates – and their communities.

Dated: December 23, 2020 Respectfully submitted,

RING BENDER LLP
PATRICK K. BOBKO
NORMAN A. DUPONT

By: 

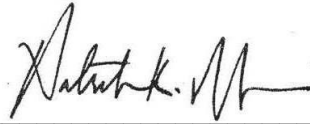
Patrick K. Bobko

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Huntington Beach, La Habra,
Laguna Beach, Laguna Hills,
Laguna Niguel, Lake Forest,
Mission Viejo, Orange, Placentia,
Rancho Santa Margarita, San
Clemente, San Juan Capistrano,
Stanton, Tustin, Villa Park,
Westminster, and Yorba Linda

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 5,426 words (excluding tables and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word.

Executed on December 23, 2020 at Newport Beach,
California.

A handwritten signature in black ink, appearing to read "Patrick K. Bobko", written over a horizontal line.

Patrick K. Bobko

1 5. For the safety of the possibly infected arrestee, other inmates, and
2 NBPD personnel, the NBPD Jail will not accept an arrestee who has, or is
3 suspected to have, COVID-19. Instead of transporting her to the NBPD Jail,
4 the arresting officer needed to take the arrestee to Hoag Hospital, where he
5 requested a COVID-19 test for the arrestee. While waiting for the results of
6 the arrestee's COVID-19 test, each involved officer was forced to quarantine
7 themselves in their patrol cars in the parking lot as a precaution until they
8 could be assessed under the COVID-19 Protocol.

9 6. The arresting officer began the process of checking the arrestee
10 into Hoag Hospital as well as waiting for a room, a nurse to administer the
11 COVID-19 test, and the test results to return. This entire time, three patrol
12 officers sat parked in their respective patrol cars in the Hoag parking lot,
13 completely out-of-service, and unable to respond to calls due to the possible
14 COVID-19 exposure. After more than two hours, the female DUI arrestee's
15 COVID-19 test was confirmed positive.

16 7. Because of the positive test, the arresting officer was then forced
17 to book the arrestee at Orange County Jail (OCJ), which has a dedicated
18 COVID-19 ward. The arresting officer transported the infected arrestee to OCJ
19 while NBPD Jail staff coordinated the release, paperwork, and booking process
20 with OCJ staff. Upon arrival, the officer and arrestee waited in the parking lot
21 for more than two hours while OCJ staff prepared to accept the infected
22 arrestee. After an additional hour of paperwork OCJ medical staff accepted
23 the arrestee and the officer returned to NBPD where additional steps were
24 taken to limit any additional COVID-19 exposures.

25 8. The arresting officer isolated his patrol vehicle in the NBPD
26 parking lot. Although privacy measures were afforded, he was required to
27 completely disrobe and isolate his entire uniform, including his firearm, boots,
28 ballistic vest, and uniform. This process was done in the parking lot to

1 minimize cross-contamination, and as a result, the officer was prohibited from
2 entering the police department building or locker room. The patrol vehicle was
3 placed out-of-service until a contracted professional decontamination service
4 could properly clean the patrol vehicle.

5 9. The arresting officer, the victim of a confirmed COVID-19
6 exposure, was now subject to a quarantine based on our COVID-19 Protocol.
7 Per these requirements, the officer was not able to return to work until
8 completing a 14-day quarantine. Unfortunately, the officer lives with a 75-
9 year-old relative and he did not want to subject the elder subject to a possible
10 COVID-19 exposure. As a result, the officer decided to pay out-of-pocket
11 expenses for a hotel room for several days of his quarantine.

12 10. The arresting officer ended up missing nine scheduled patrol shifts
13 during his 14-day quarantine. The absence of this officer required staff to
14 backfill his scheduled shifts by paying overtime to other officers.

15 11. Additionally, this highly skilled DUI expert was no longer
16 available to keep the streets of Newport Beach safe from DUI drivers for this
17 two-week period during his absence.

18 12. This is just one example, but due to officer safety requirements,
19 many routine calls require the presence of several officers. Quarantining these
20 officers after a routine call in which a COVID-19 exposure may occur can
21 easily result in the loss of up to 50 shifts or more in just a 14-day period if the
22 elements of a confirmed exposure are met under the COVID-19 Protocol.

23
24 COVID-19 PROTOCOL AND FALSE CLAIMS BY ARRESTEES

25
26 13. It is not only the confirmed positive COVID-19 exposures that
27 negatively affect patrol deployments. Even false and unsubstantiated claims of
28 COVID-19 can seriously impact the deployment of police resources. To protect

1 our officers and the public in which they directly contact, NBPD must follow
2 the COVID-19 Protocol whenever officers have extended contact with a subject
3 who claims to have COVID-19; even if officers believe the claim is false.

4 14. A simple claim or allegation that the contacted person is positive
5 for COVID-19 is enough for officers to be compelled to transport the person
6 (usually an arrestee) to the hospital for a COVID-19 test. As in the example
7 provided above in the DUI arrest, all exposed officers must self-quarantine in
8 their patrol vehicles while waiting for the test results to come back. This
9 process can take four hours or more. During this entire time, any involved
10 officer is completely out-of-service and unable to respond to calls in the City.

11 15. Often, an arrestee's test results return negative for COVID-19.
12 The arrestee is then transported and booked at NBPD Jail while the involved
13 officers all return to full-service. There is no way to quantify, measure, or
14 account for this relatively routine event in this COVID-19 era, though the
15 impact upon NBPD personnel is tangible. Besides not being able to assist the
16 community and their partners for several hours while quarantined in their
17 patrol vehicles, the emotional effects of waiting hours on end for the results to
18 return on a possible COVID-19 exposure are compelling and take a toll on
19 officers. Unfortunately, this process has happened frequently in the past nine
20 months; either from vindictive subjects trying to avoid arrest, or from sincere
21 subjects who are truly unsure of their state of infection.

22
23 THE IMPACT OF THE ORANGE COUNTY SHERIFF'S DEPARTMENT'S
24 COVID-19 JAIL PROTOCOL ON CAREER CRIMINAL ACTIVITY
25

26 16. California Penal Code Section 999b states in part, "*The*
27 *Legislature hereby finds a substantial and disproportionate amount of serious*
28 *crime is committed against the people of California by a relatively small*

1 *number of multiple and repeat felony offenders, commonly known as career*
2 *criminals. ...” (emphasis added)*

3 17. Career criminals are defined under California Penal Code
4 Section 999e. Basically, these are individuals who are arrested for certain
5 felony crimes and are either being prosecuted for three or more separate
6 certain felony offenses not arising out of the same transaction or have previous
7 certain felony convictions within the past ten years that qualify them for such
8 a status.

9 18. Year to date, the NBPD has seen an increase in career criminal
10 activity in the City as it relates to property crime. For example, a burglar was
11 arrested in connection with a series of seven separate boat burglaries in the
12 City this year. Another burglar / identity thief was arrested three different
13 times in the City this year. A thief with a DUI history was arrested five
14 different times in the City this year. A burglar / thief who steals from vehicles
15 was arrested six different times in the City this year. A mail/package thief was
16 arrested seven different times in the City this year. A burglar / thief with a
17 history of resisting arrest was arrested ten different times in the City this
18 year.

19 19. NBPD detectives arrested a pair of burglars / thieves this year
20 that had criminal histories so lengthy the reports couldn't be accessed through
21 the standard Automated Criminal History System (ACHS) response and
22 instead had to be emailed to the requestor. These individuals were not only
23 wanted for property crimes in Newport Beach, but for similar crimes in cities
24 across Orange County. And, one of their other accomplices, who was identified
25 and arrested at a different time this year by NBPD, had ten open cases in the
26 county at the time of his arrest.

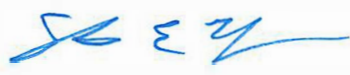
27 20. It is believed these career criminals involved in property crimes
28 continue to target our community, and be repeatedly arrested in Newport

1 Beach, primarily due to the restrictions placed on the Orange County Sheriff's
2 Department (OCSD), which limits the Sheriff's ability to maintain custody of
3 these individuals due to their existing COVID-19 Jail Protocol that require
4 them to release non-violent offenders.

5 21. It is believed that a further tightening of OCSD's COVID-19 Jail
6 Protocol that will force them to release 1,800 violent and dangerous offenders,
7 many of which are career criminals, will have the same effect as we are
8 experiencing with these career criminals involved in property crimes, which
9 unnecessarily imperils every community in Orange County to include the City
10 of Newport Beach.

11
12 I declare under penalty of perjury of the laws of the State of California
13 that the foregoing is true and correct.

14
15 Signed this 17th day of December 2020 in Newport Beach, California.

16
17 

18 _____
19 Steve Rasmussen
20 Police Lieutenant
21 City of Newport Beach
22
23
24
25
26
27
28

PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Orange, State of California. My business address is 3150 Bristol Street, Suite 220, Costa Mesa, CA 92626.

On December 24, 2020, I served true copies of the following
**AMICUS BRIEF OF CITY OF NEWPORT BEACH AND 20
OTHER CITIES; AND DECLARATION OF LIEUTENANT
RASMUSSEN IN SUPPORT OF BRIEF**

described as on the interested parties in this action as follows:

Honorable Peter J. Wilson
Department CX 102
Orange County Superior Court
Civil Complex Center
751 W. Santa Ana Blvd.
Santa Ana, CA 92701

Respondent Court

VIA U.S. MAIL ONLY

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BY ELECTRONIC SERVICE: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling), I provided the document(s) listed above electronically on the TRUE FILING Website to the parties on the Service List maintained on the TRUE FILING Website for this case, or on the attached Service List. TRUE FILING is the on-line e-service provider designated in this case. Participants in the case who are not registered TRUE FILING users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: December 23, 2020



Natasha Gonzales